No. 90-417

Supreme Court, U.S.
FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

ALAN S. KRAMER,

Petitioner,

-- vs. --

GAINES W. HAMMOND, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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RESTATED QUESTIONS PRESENTED

When a New York lawyer, who worked with and through South Carolina lawyers to defraud and conspire against a South Carolina resident, is sued in South Carolina:

I. Is personal jurisdiction constitutionally proper over the New York lawyer when both the minimum contacts and reasonableness criteria are satisfied?

II. Is personal jurisdiction appropriate in a state court proceeding where the court denies a motion to dismiss based upon its application of a *prima facie* standard to the facts supporting jurisdiction?

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STATEMENT OF THE CASE

Respondent, Gaines W. Hammond, Jr., is a urologist practicing in Spartanburg, South Carolina. In the summer of 1984, Dr. Hammond became interested in purchasing technology which he believed would allow for the successful development of a lithotripter, a machine which allows for the noninvasive treatment of kidney stones. Dr. Hammond hired the South Carolina law firm of Butler, Means, Evins & Browne to set up a corporation to receive the lithotripter technology. Dr. Hammond purchased an option to acquire the technology from its inventors, Erroll Payne, Richard Penfil and Charles McGregor (the "California Group") for $50,000, with a payment of $1,100,000 to be made to the California Group by October 22, 1984, the end of the option period. Dr. Hammond and the California Group reached an agreement whereby he would own 70% of the company, and the California Group would own 25%. The remaining 5% was assigned to another individual whose involvement is not material to this action. (R. 391).[1]

The legal aspects of the project were undertaken by two members of the South Carolina firm, Thomas A. Evins and Stanley T. Case, and by Petitioner Alan S. Kramer in New York,[2] who kept in close contact with the

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[1] References are to the Transcript of Record before the South Carolina Supreme Court.

[2] Kramer, Evins and Case all have various views of who was representing whom in this project. Evins and Case were representing themselves as subscribers to the stock of the corporation, Dr. Hammond (R. 531), Hammond Technologies,

(Continued on following page)

South Carolina lawyers. (R. 20, 25, 32, 34, 82-89, 91-101, 123, 536). After returning from a meeting in California, Evins and Kramer drafted a subscription agreement (Subscription Agreement No. 1) which shows that Dr. Hammond was to receive seventy percentage points of the company, Hammond Technologies, Inc. (HTI) (R. 25, 82-89).

Kramer, Evins and Case then entered into an agreement of their own and prepared another subscription agreement (Subscription Agreement No. 2) which provided for a very different division of ownership of HTI than the one Dr. Hammond reached with the California Group. Specifically, Dr. Hammond's ownership interest was reduced to 35 points or 35,000 shares. Evins and Case took 6 1/2 points or 6,500 shares for themselves. Kramer also took 6 1/2 points or 6,500 shares. The California Group's subscription remained at 25 points or 25,000 shares. (R. 91-92).

After a meeting in New York (R. 40, 136, 140) and numerous telephone conversations between Kramer and the lawyers in South Carolina (R. 27, 30, 73-74, 140-141), Kramer, Evins and Case set out to formalize their rights

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(Continued from previous page)

Inc., which later became known as Medstone (R. 438), and Erroll Payne. (R. 546). Kramer was representing himself (R. 150), Dr. Hammond (R. 523, 527, 804), all of the subscribers to the corporation including the California Group, Evins, Case, and Dr. Wallace. (R. 20, 147, 1052). Contrary to the implication of Kramer, there is significant evidence that *Kramer represented Hammond*. (R. 523, 527, 804).

to the stock of Dr. Hammond's company. They accomplished this by lying to Dr. Hammond about the lawyers' participation and its effect on Dr. Hammond's control of HTI (R. 5, 447, 603, 1052).

Upon presentation of Subscription Agreement No. 2, which Kramer sent to Dr. Hammond in South Carolina, Evins represented to him that the California Group insisted upon the allocation of a total of 13 points to the attorneys and that the deal would not be accepted by the California Group unless Dr. Hammond signed the new agreement. (R. 394, 603). Dr. Hammond later discovered that the California Group had *not* insisted on the lawyers' participation in the ownership of the company. In fact, one of the inventors, who was apparently also misled, called Dr. Hammond wanting to know why *Dr. Hammond* had done this. (R. 405-406).

Kramer wanted to be involved in Dr. Hammond's company and he wanted shares. Kramer got his shares and Evins and Case took some for themselves as well. Kramer testified:

> Q. How did it come up about Mr. Evins getting six to seven percent?
>
> A. Tom Evins told me they would subscribe to the same number that I would subscribe to.

(R. 136).

Evins, on the other hand, testified at his deposition that the lawyers' participation was Kramer's idea:

> Q. Who brought up that you should get 6,500 shares?
>
> A. I don't know specifically. Mr. Kramer, I think.

(R. 504).

Q. So, when you went to New York who is the one that came up with the idea that you would get 6,500 shares?

A. The best of my recollection it was Mr. Kramer.

(R. 509).

Evins' deposition testimony confirmed Kramer's role in their agreement to take shares away from Dr. Hammond:

Q. Did Mr. Kramer then insist that he get a portion of Dr. Hammond's 70,000 shares?

A. He suggested that this would be in the best interest of the project.

Q. And he suggested that you get 6,500 shares of Dr. Hammond's shares; is that correct?

A. I don't think you could call them exactly Dr. Hammond's shares, but that general allocation, anymore than the 15,000 set aside for capital acquisition.

Q. And you agreed to that?

A. Yes.

(R. 511).

It is difficult to see how it was in the best interest of anyone but the lawyers to reallocate Dr. Hammond's shares to Kramer and Evins, who was already charging an hourly rate of $125 per hour. (R. 492).

In an effort to comply with the terms of his Option Agreement, Dr. Hammond negotiated an agreement between HTI and Michael Reese Hospital in Chicago,

Illinois. Under that agreement, Michael Reese Hospital would purchase the licensing rights to use one of the lithotriptor machines for the price of $1,200,000 and thereby permit Dr. Hammond to raise the capital required by his Option Agreement to purchase the license for the technology.

In accordance with the terms of the Option Agreement, and with the October 22nd Option deadline approaching, Dr. Hammond purchased an extension of the Option until 5:00 o'clock p.m. on November 8, 1984, for an additional $25,000.

The Michael Reese Hospital Agreement required, among other things, a $400,000 irrevocable letter of credit in its favor. As the $400,000 letter of credit was essential to consummation of the sale to Michael Reese Hospital, (R. 553) and thus essential to Dr. Hammond's exercise of his Option, Dr. Hammond entered into an agreement, dated November 6, 1984, with one Dr. Gerald Wallace to provide the letter of credit ("Wallace Agreement"). (R. 419).

The Wallace Agreement provided for the essential letter of credit and was otherwise favorable to Dr. Hammond and the California Group. (R. 419, 566). Furthermore, it would have allowed Dr. Hammond to comply with the terms of his Option Agreement, provide HTI with the licensing rights to the technology and maintain Dr. Hammond's control over 35% of HTI.

The lawyers were not satisfied with taking just 13,000 shares of Dr. Hammond's company and further reduced Dr. Hammond's share after allowing his option to expire. Evins increased his share to 7,500 shares and Kramer took

an additional 4,000 shares for a total of 10,500 shares. The lawyers took a total of 18,000 shares, and Dr. Hammond, the only one who had risked a dime on the project, was cut from 35,000 shares to 10,000 shares. (R. 103-110, 190-191).

Kramer said of the extra shares:

Q. Why do they give Mr. Evins 7,500 shares?

A. You will have to ask them.

Q. Didn't they tell you?

A. There were discussions back and forth as to what was fair to do under the circumstances.

* * *

Q. Mr. Kramer, when you talked to Mr. Evins, did you talk to Mr. Evins about his gaining 1500 shares in South Carolina?

A. There were discussions with me in New York, the California Group in California, Mr. Evins in South Carolina where there were discussions as to how the corporation would be capitalized under these new circumstances.

(R. 66).

Evins testified:

Q. So, when you got 7,500 shares in, I believe it was November of 1984, that was a total surprise to you.

A. It was.

Q. Did you then take those 7,500 shares?

A. I did.

Q. How many did Dr. Hammond have?

A. I don't know. At that time, I believe he had 10,000 shares if I'm not mistaken.

Q. Why didn't you give those shares to Dr. Hammond?

A. I could see no reason to give them to Dr. Hammond.

Q. Why not?

A. They were not his shares.

Q. Whose were they?

A They were allocated to me.

(R. 516).

To the detriment of Dr. Hammond, his lawyers refused to go forward with the closing by using the Wallace Agreement. Without reading one word of the Wallace Agreement, Evins criticized it, as well as Dr. Hammond, and ran to call Kramer. Dr. Hammond had managed to come up with the letter of credit, spoiling the plans of Evins and Kramer to take control of HTI. (R. 381, 382, 386). Kramer and Evins had been cooperating in trying to prevent Dr. Hammond from securing a letter of credit. Kramer told Dr. Hammond that it was not necessary for him to get a letter of credit at all and that everything was "in line". (R. 384, 457). Kramer told Dr. Hammond he didn't need to be in Alabama talking to Gerald Wallace because Evins had the necessary letter of credit already. (R. 383). Furious at Dr. Hammond for spoiling the lawyers' plans, Evins said that "the company was in his back pocket, that I'd [Dr. Hammond] never control any part of this company, never have anything to do with this company. . . . " (R. 382).

The lawyers, including Kramer, then began to intentionally prevent Dr. Hammond from being able to maintain his ownership percentage of HTI by allowing the November 8 option deadline to pass and by representing to Dr. Hammond that his option had expired and that he was out of HTI. (R. 409-410, 413). Because his signature and his letter of credit were needed to close the deal, and a urologist was needed to present the technology to the urological community, Dr. Hammond was kept in, but with the further reduction in his ownership of HTI to only 10,000 shares. (R. 443, 469, 576, 577, 625-626).

In the Michael Reese negotiations, Kramer had primary control over Dr. Hammond's interests. (R. 523, 628). If the Michael Reese deal did not close, Kramer's clients, the California Group, would be in complete control. If Kramer delayed, it helped his California clients; if Kramer proceeded, it helped his other client, Dr. Hammond. Kramer had a conflict of interest which resulted in substantial injury to Dr. Hammond. Aware of his conflict, Kramer continued to carry out his scheme (R. 149) and succeeded in preventing a completion of the letter of credit until the November 8 deadline had passed.

Mary Dempsey, an in-house attorney at Michael Reese, testified that she knew of no urgency nor any reason that the deal could not have closed by November 8, 1984. (R. 634, 667-668). She testified that the material terms of the contract were finalized prior to November 5. (R. 657-658, 676, 988-1025). Unfortunately for Dr. Hammond, Kramer delayed the closing until after the November 8 deadline by insisting on last minute changes to the Michael Reese Agreement. (R. 377, 828). Kramer kept making changes in its terms or conditions (R. 629-630,

632, 635, 644-645, 657-659) and even tried to renege on part of the deal, causing further delay. (R. 665-666). There was no reason why the closing could not have taken place prior to expiration of Dr. Hammond's option. (R. 662, 667, 874). But for the active interference of Kramer it would have.

Kramer and Evins then wasted no time in proceeding to consolidate their control of HTI on November 10. Evins received in South Carolina a new subscription agreement prepared by Kramer. (R. 68-69). This demonstrates that Kramer and Evins intended to let the deadline pass, and they were already drafting the new division of ownership, which further increased their shares and further decreased Dr. Hammond's shares. (R. 190-191).

Indeed, the deal with Michael Reese did close by telephone on November 13, 1984,[3] The structure of the project was accomplished with the same "Hammond Technologies, Inc." and the same "Dr. Wallace's Letter of Credit" that Dr. Hammond had obtained. (R. 52). The only one who lost was Dr. Hammond. *All of the lawyers profited.* (R. 63-66, 516).

This lawsuit is based on the fact that Kramer, Evins, and Case orchestrated a series of transactions which consistently reduced Dr. Hammond's share of his company and caused his option to purchase the lithotriptor technology to expire. Kramer assumed responsibility for negotiating the critical contract with Michael Reese Hospital. (R. 523, 628). Because of the failure of *Kramer* to complete an agreement for placing a machine at Michael

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[3] The 10th and 11th were Saturday and Sunday.

Reese Hospital in Chicago, Dr. Hammond was cheated out of millions of dollars worth of stock. Kramer, Evins, and Case entered into an illegal agreement to take most of Dr. Hammond's interest in the project. Dr. Hammond went to Evins and Case with a deal to control 70% of the company, and he finished owning only 10%. On the other hand, Evins and Case received 7.5%, and Kramer got 10.5%. (R. 103-110). Kramer's role in the lawyers' scheme included substantial contacts with the State of South Carolina, as shown below.

KRAMER'S CONTACTS WITH SOUTH CAROLINA

1. Over a period of months, Kramer engaged in extensive telephone calls to South Carolina. The subject of these conferences related directly to the activities complained of in this lawsuit. Evins' and Case's draft bill shows that from August 28 until November 14 (the time period involved in this case), there were at least 55 long distance telephone calls between Kramer and Evins and Case in South Carolina. These calls were placed on at least 35 separate days and totalled hours upon hours. (R. 18, 27, 28, 30, 31, 34, 38, 41, 50, 66-67, 72-80, 140-141, 190-191, 611).

2. Kramer transmitted numerous items of correspondence and documents (including the fraudulent subscription agreements and the agreement with Michael Reese Hospital) to South Carolina, and in turn received various correspondence and documents from South Carolina. The time frame and subject of these contacts relate directly to activities complained of in this lawsuit. (R. 25, 34, 35, 39, 68-69, 366).

3. Kramer represented Dr. Hammond, a South Carolina resident, and negotiated on his behalf for the placement of a lithotripter machine at Michael Reese Hospital in Chicago, which was critical to Dr. Hammond's timely exercise of his option to purchase

the technology. Successful completion of Kramer's obligations under this contract to formally close the deal required contact with South Carolina and the execution of various documents by Dr. Hammond in South Carolina. (R. 35, 39, 46, 49-51, 365-366, 468-469, 611, 832, 833). Kramer billed Dr. Hammond for his disbursements in connection with this contract, and Dr. Hammond sent him a check from South Carolina, drawn on a South Carolina bank. (R. 1055-1057).

4. Kramer took advantage of his ability to control the timing of the closing and allowed Dr. Hammond's option to expire. Kramer closed the deal and sent documents (including the bill of sale) to South Carolina for Dr. Hammond's *necessary* signature. Unfortunately for Dr. Hammond, Kramer exercised his control and made sure this took place *after* the option period has passed. (R. 443, 456, 469).

5. Kramer drafted the agreement with Michael Reese with the assistance of his South Carolina agents, Evins and Case, and then sent the draft to South Carolina. (R. 152, 163, 165, 353).

6. Kramer became the director, and later the president, of HTI, a company whose principal place of business was South Carolina, as stated in its bylaws and letterhead. (R. 48, 414, 1103). South Carolina is also where the company's meetings were held (R. 436, 483, 548, 615, 617) and where its bank account was located. (R. 470).

7. Kramer entered into a contract for the presidency of HTI, a company with its principal place of business in South Carolina, the terms of which included a monthly salary for him of $15,000. (R. 48-49, 1103).

8. Kramer was involved in a project which contemplated involvement of a South Carolina urologist, Dr. Hammond from the State. (R. 113, 115).

9. Kramer was involved in the project to put one of the first lithotripter machines in Spartanburg, South Carolina. (R. 117, 603).

10. Medstone, formerly HTI, listed Spartanburg, South Carolina, as an address of the business on its letterhead. (R. 189).

11. In addition Kramer's scheme was carried out with the constant and essential help of Evins and Case, his South Carolina agents and co-conspirators. Evins and Kramer were "cooperating". (R. 154). The timing of the presentation of Subscription Agreement No. 2 to Dr. Hammond and the California Group and efforts to prevent Dr. Hammond from securing a letter of credit clearly demonstrate a cooperative effort to see that the ownership of HTI included participation by the lawyers.

Procedural History

Dr. Hammond filed suit in South Carolina against his South Carolina counsel and Kramer in March of 1986. The complaint sets forth causes of action for conspiracy, fraud, breach of fiduciary duty, negligence, slander and violation of the South Carolina Unfair Trade Practice Act. Kramer moved, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure to dismiss the case for lack of personal jurisdiction.[4] Kramer did not answer the Complaint, nor did he respond to any discovery requests. Dr. Hammond noticed Kramer's deposition, and upon motion of Kramer, the deposition was limited to jurisdictional issues.

The standard recognized by both parties as applicable to the trial court's ruling on Kramer's motion to dismiss was the *prima facie* standard, which requires a plaintiff, when met with a jurisdictional challenge, to

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[4] See p. 11a of Appendix to Petition for a Writ of Certiorari.

produce evidence in support of jurisdiction.[5] Kramer never challenged the standard until he filed his brief with this Court. Previously, Kramer had argued that Dr. Hammond had not made the required *prima facie* showing. The trial court disagreed and denied Kramer's motion to dismiss in August of 1987.

Kramer then appealed to the South Carolina Supreme Court. Again, Kramer recognized the *prima facie* standard as the applicable one and vigorously argued that the facts should be interpreted so as not to establish jurisdiction.[6] In January of 1990, in a unanimous decision, the South Carolina Supreme Court affirmed the denial of Kramer's 12(b)(2) Motion to Dismiss. Kramer then filed a petition for rehearing, again presenting the *prima facie* standard and arguing for a rehearing based on a failure of proof by Dr. Hammond under that standard. In June of 1990, the Petition for Rehearing was unanimously denied.

Kramer then filed his Petition with this Court. Having lost under the *prima facie* standard, which he had theretofore recognized as the proper one, Kramer now wants a different standard. (See Question I of Kramer's Petition for a Writ of Certiorari).

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[5] Dr. Hammond's brief in the South Carolina Supreme Court at pp. 13-14; Kramer's brief in the South Carolina Supreme Court at pp. 2-3; and his Petition for Rehearing at pp. 1, 2, 3, 9, and 10.

[6] Nine pages of his brief before the South Carolina Supreme Court and all 44 pages of his reply brief were dedicated to the facts, and how they should be interpreted.

SUMMARY OF ARGUMENT

Alan Kramer, a New York lawyer, conspired with his co-defendants, South Carolina lawyers, to deprive Gaines Hammond, a South Carolina resident, of part of a business venture. The facts, as demonstrated by depositions, affidavits, and pleadings, reflect numerous South Carolina contacts related to the conspiracy between Kramer and the South Carolina lawyers, occurring both by mail and telephone. These actions were taken with the intent to harm Hammond, and they satisfy the minimum contacts and reasonableness considerations established by this Court in the jurisdiction cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and continuing through *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Since the facts support *both* the minimum contacts criteria as well as a consideration of fairness, South Carolina state court jurisdiction over Kramer is proper.

In addition, the South Carolina state court procedure of determining a motion to dismiss as to jurisdiction based upon a *prima facie* standard is not constitutionally improper. The record demonstrates that jurisdiction would be proper whether a *prima facie* standard or a preponderance of the evidence standard is applied. Furthermore, the petitioner did not raise this issue before the South Carolina state trial or appellate courts, but has instead raised this issue for the first time before this Court. Finally, the issue as to the South Carolina state court rules is not one involving any dispute between the Federal Circuit Courts of Appeals, but instead relates solely to South Carolina state proceedings.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

THE ACTIONS OF THE PETITIONER-NEW YORK LAWYER, ALAN S. KRAMER, IN CONSPIRING WITH SOUTH CAROLINA ATTORNEYS TO DEFRAUD SOUTH CAROLINIAN GAINES HAMMOND OF HIS INTEREST IN A BUSINESS VENTURE, SATISFIED BOTH MINIMUM CONTACTS AND REASONABLENESS CONSIDERATIONS IN ALLOWING SOUTH CAROLINA STATE COURTS TO ASSERT PERSONAL JURISDICTION OVER KRAMER.

Contrary to this position espoused by the Petitioner, the real issue in this case is whether the assertion by South Carolina of jurisdiction over Kramer is constitutionally proper.[7] As already demonstrated in the Statement of the Case, Kramer worked and conspired with South Carolina lawyers to deprive and defraud a South Carolinian (Gaines Hammond) of part of his business venture. The actions undertaken by Kramer, both alone and with the South Carolina lawyers, make jurisdiction constitutionally appropriate and consistent with the principles established by this Court in the decisions from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

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[7] The Petitioner has attempted to obfuscate the true issue before this Court by his creation of the three questions presented. His second and third questions actually involve the substantive application of jurisdiction, which is considered in this section of Respondent's Brief. Petitioner's first question is procedural in nature, and is considered in this second question herein.

The Supreme Court of South Carolina, in its opinion, reviewed some of the many contacts between Kramer and the State of South Carolina. App. at 1a-5a. The Court conducted an analysis of "minimum contacts" and determined that this jurisdictional consideration was satisfied. App. at 5a-6a. Furthermore, the Court also considered whether "fair play and substantial justice" was satisfied, and it concluded that it was.[8] Thus, despite Kramer's implications to the contrary, the South Carolina Supreme Court conducted a jurisdictional analysis in accordance with constitutional parameters.

The various causes of action in the Complaint in the instant action include conspiracy, as well as fraud and deceit. The pleadings, affidavits, and depositions[9] demonstrate the extent to which Kramer worked and conspired with South Carolina lawyers against the interest of Hammond. Simply put, Kramer spoke with, wrote to, and sent documents to South Carolina, all in his efforts to coordinate with the South Carolina lawyers in taking a large share of the business venture at issue away from Hammond. Petitioner's entire analysis is fatally flawed

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[8] Petitioner apparently objects to the format of the opinion by the South Carolina Supreme Court in that it did not contain separate sections labeled "minimum contacts" and "fair play and substantial justice," with facts delineated under each section. Obviously, the form used by a State Supreme Court for its opinion is irrelevant. However, a fair reading of the South Carolina Supreme Court decision demonstrates its analysis on both issues.

[9] Significantly, much of the Record in this matter is derived from extensive depositions, which create factual support for the allegations and the jurisdictional assertions.

by his unwillingness to recognize the obvious; namely, that Kramer engaged in a series of activities over a several month period of time, which involved him working with South Carolinians (who were located in South Carolina) in a scheme directed at another South Carolinian. Kramer's argument as to his lack of contacts with South Carolina simply is not supported by the record.

The starting point of the due process analysis under the Fourteenth Amendment is whether "the Defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Furthermore, the minimum contacts must be based upon "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The limitations on jurisdiction based on contacts can be seen most clearly in situations where products of a manufacturer are sent to a forum state without a specific action by the manufacturer itself. *E.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Kramer has more than satisfied the "minimum contacts" test with his wide range of activities directed at South Carolina, involving South Carolinians, and causing economic harm to a South Carolinian.

The second jurisdictional consideration is that of reasonableness. The test is whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316,

quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). As this court has stated:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interests in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113, quoting *World-Wide Volkswagen*, 444 U.S. 286, 292 (1980). In *World-Wide Volkswagen*, an accident involving an automobile sold in New York to New York residents, while traveling in Oklahoma, was found to be insufficient to put the Defendant on notice that it could reasonably anticipate being brought into court in the forum State. Likewise, in an international context in *Asahi*, a company manufactured tire valve assemblies in Japan, which assemblies were incorporated into finished tires in Taiwan by another company. One of the tires ended up in California and was alleged to be the cause of an accident in that state. This Court determined that "fair play and substantial justice" precluded jurisdiction in that instance.

In the instant action, Kramer specifically directed his activities (telephone calls, letters, documents) to the forum state of South Carolina.[10] Kramer knew that

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[10] In his Petition, Kramer argues that he had no meaningful "contacts, ties or relations in or with South Carolina." P. 19, Petition for Writ of Certiorari. The numerous contacts initiated

(Continued on following page)

Hammond was a South Carolinian and that it was Hammond's portion of the business venture that Kramer and the South Carolina lawyers were taking. With the activities being aimed at South Carolina and the injuries being sustained in South Carolina (by Hammond's loss of a portion of his business venture), Kramer had every reason to anticipate being held accountable for his actions in a single proceeding against both himself and the South Carolina lawyers.[11]

Kramer's Petition inaccurately portrays the analysis of the South Carolina Supreme Court in its decision and Kramer's actions in creating the factual background to

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by Kramer with South Carolina demonstrate the falsity of this assertion. In point of fact, Kramer did everything but physically enter the State of South Carolina, and physical presence has never been a *requirement* by this Court for the assertion of jurisdiction.

[11] Kramer inaccurately asserts that South Carolina has not reformulated its test for due process to take into account the decisions of this Court. In fact, the South Carolina Supreme Court *in the instant decision* cited *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) as to Kramer's availment of the forum state. This is consistent with recent cases by the South Carolina appellate courts demonstrating their concern for and attention to this Court's mandates in jurisdictional cases. *E.g., Colite Indus. Inc. v. G.W. Murphy Constr.*, 297 S.C. 426, 429, 377 S.E.2d 321, 322 (1989) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)); *Atlantic Soft Drink Co. of Columbis v. South Carolina Nat'l Bank*, 287 S.C. 228, 232, 336 S.E.2d 876, 879 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)); *Keller v. Keller*, 296 S.C. 411, 417, 373 S.E.2d 692, 693 (Ct. App. 1988) (citing *Kulko v. Superior Court*, 436 U.S. 84 (1978)).

this case. A reading of the South Carolina Supreme Court's decision makes it clear that the Court employed the requirements established by this Court for determining the constitutional limits of personal jurisdiction.[12] Not only did the Court make the necessary consideration of minimum contacts, it also made the appropriate determination as to reasonableness. Of utmost importance, Kramer, a lawyer, consciously directed activities at South Carolina in a variety of forms, and there is no room for him now to complain on either a constitutional or factual basis that he is being required to face justice in South Carolina.

II.

THE SOUTH CAROLINA STATE COURT CORRECTLY APPLIED ITS *PRIMA FACIE* STANDARD IN RULING UPON KRAMER'S PROCEDURAL MOTION TO DISMISS.

In its simplest form, the procedural issue raised by the Petitioner in the first question of his brief involves the application of a *prima facie* standard in determining the motion to dismiss. In the instant action, however, jurisdiction is proper regardless of whether a *prima facie* standard or a preponderance standard is applied. Furthermore, the question at issue involves the rules of procedure for South Carolina state courts and does not involve any conflict among the federal circuits concerning the Federal Rules of Civil Procedure.

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[12] The interest of South Carolina in providing a forum for an aggrieved resident against lawyers both in the forum state and another state in a single proceeding is self-evident.

It is interesting to note that Kramer has raised the question as to the proper standard for the first time on his Petition to this Court. While litigating this matter in South Carolina, he did not question the *prima facie* standard, and it is only after he lost at both the trial and appellate court levels in South Carolina that he raised the issue. Kramer's failure to allow the South Carolina judicial system to consider this question first, prior to raising it before this Court, is reason alone for this Court not to consider the issue.[13]

Procedurally, the jurisdictional question was considered by the South Carolina Courts pursuant to a motion to dismiss, filed under Rule 12 of the South Carolina Rules of Civil Procedure. App. at 11a - 14a. This rule is part of the South Carolina Rules of Civil Procedure, which became effective on July 1, 1985, and which were based, in large part, on the Federal Rules of Civil Procedure. However, the state rules are not identical to the federal rules, and the differences are highlighted in the

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[13] As this Court has noted on a number of occasions, ordinarily it does not decide questions which have not been raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231 (1976) (citing *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363, n. 16 (1958)). However, the rule is not inflexible, but it is only exceptional cases that merit review of questions not considered below. *E.g., Duignan v. United States*, 274 U.S. 195, 200 (1927). In the instant case, Kramer's issue does not merit this "exceptional consideration," especially given the fact that jurisdiction is constitutionally appropriate based on his activities (See Question One of this brief) and the fact that jurisdiction would be appropriate under either the *prima facie* or the preponderance standard.

Reporter's Notes. In fact, the notes to Rule 12 demonstrate that there are differences between the Rule 12 in the South Carolina Rules of Civil Procedure and the Rule 12 in the Federal Rules of Civil Procedure. App. at 14a - 15a.

Any difference which may exist between the Federal Circuit Courts of Appeal is thus inapposite to the action before this Court. Since the South Carolina Rules of Civil Procedure are enacted for South Carolina *alone*, there is no dispute involving either the federal rules or the federal courts. The procedural question which Kramer attempts to generate therefore involves federal courts (as reflected by his numerous federal citations) and not the state courts of South Carolina. Thus, there is no constitutional question presented by the standard utilized by a state court in determining a motion to dismiss; no authorities are cited by Kramer for such a proposition and there is no constitutional issue presented for this Court on that point.

Although the South Carolina trial and appellate courts applied a *prima facie* standard (as reflected in the orders themselves)[14] Hammond would have been

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[14] Both the South Carolina Supreme Court decision and the trial level decision make reference to the utilization of a *prima facie* standard in considering a jurisdictional issue at a pretrial stage. App. at 4a, 7a. This is in accordance with the general case law in South Carolina that: "[a]t the pretrial stage of determination of jurisdiction, the plaintiff needs only to make a *prima facie* showing of jurisdiction by his pleadings and affidavits that the trial court should exercise jurisdiction." *White v. Stevens*, ___ S.C. ___, 387 S.E.2d 260, 262 (1990); (citing

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successful in defeating Kramer's Motion to Dismiss no matter which standard was applied. Kramer fails to recognize that jurisdiction in this case is appropriate not only based on the actions which he undertook alone, but also those that he undertook in conjunction with the South Carolina lawyers. He ignores the numerous telephone calls, letters, and documents that he either generated with or sent to the South Carolina lawyers. This conduct, under *any* standard, is sufficient to support jurisdiction over Kramer in South Carolina.

Kramer's reliance on summary judgment principles also demonstrates that his motion was properly denied. He cites *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as to various matters involving considerations of motions for summary judgment. However, Kramer fails to appreciate that "[U]nder Rule 56 of the Federal Rules of Civil Procedure, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962). In the

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Fields v. INA Filtration Corp., 292 S.C. 614, 358 S.E.2d 160 (Ct. App. 1987); *Askins v. Fire Door Corp. of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984)). However, that standard does not preclude a plaintiff from using other sources of support (such as depositions) or mandate that the proof cannot exceed the *prima facie* level. In the instant action, Hammond utilized additional sources of proof, and he satisfied either standard which might be applied.

instant action, *at a minimum*, Hammond demonstrated the necessary "genuine issue" on the jurisdictional subject, precluding a decision in favor of Kramer. Thus, even if reliance is given to principles governing summary judgment, jurisdiction would still be found.

Finally, it must be recognized that Kramer seeks to have this Court mandate a standard to be utilized by all state and federal courts in determining pretrial motions on jurisdiction. A distinction must be made between the procedure by which a court considers a pretrial jurisdictional challenge and whether the court ultimately finds jurisdiction. While this latter issue is one which is (and has been) a matter of constitutional significance for this Court's consideration, the procedures utilized by various courts at the pretrial stage simply do not rise to this level and, accordingly, do not warrant review by this Court.

CONCLUSION

The actions of Alan Kramer, a New York lawyer, demonstrate that he conspired with South Carolina lawyers to defraud Gaines Hammond, a South Carolina resident, of an interest in a business venture. The evidence supports the findings by the South Carolina Supreme Court as to both minimum contacts and reasonableness. Furthermore, the South Carolina state courts appropriately applied a *prima facie* standard, in acting upon Kramer's motion to dismiss. For these reasons, and for the other reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 12, 1990